Louisiana Law Review

Volume 52 | Number 5
May 1992

Louisiana Children's Code Article 808: A Positive Step on Behalf of Louisiana's Children

Jan Kirby Byland

COMMENTS

LOUISIANA CHILDREN'S CODE ARTICLE 808: A POSITIVE STEP ON BEHALF OF LOUISIANA'S CHILDREN

> I am a promise. I am a possibility. I am a promise with a capital P. I am learnin' who I am, and I'm starting to say "I can." I am a promise I can be anything I want to be.[1]

I. INTRODUCTION

In 1991, the Louisiana Legislature enacted the Louisiana Children's Code (Children's Code),[2] a comprehensive, self-contained compilation of the laws in Louisiana governing the exercise of juvenile court jurisdiction. The compilation arranges the pre-existing statutes concerning children into one source, eliminates inconsistencies between statutes, clarifies ambiguities, and codifies certain constitutional commands as developed by the jurisprudence. A codification of particular significance is Children's Code article 808,[3] which is found in the delinquency title[4] and provides that "[a]ll rights guaranteed to criminal defendants by the Constitution of the United States or the Constitution of Louisiana, except the right to jury trial, shall be applicable in juvenile court proceedings brought under this Title."[5] Arguably, Article 808 goes beyond mere codification of constitutional commands to create additional rights for children beyond those already extended by the United States and Louisiana Constitutions as currently interpreted.

This comment focuses upon article 808: what it does, what it means with respect to a child's Fifth Amendment privilege against self-incrimination, how it is a positive step on behalf of Louisiana children and whether in certain contexts it may need to be carried further so as to extend to children greater protections than currently available to adults.

Exploration of the issues presented above shall proceed as follows: Part I discusses what Article 808 means generally and with respect to the fifth amendment privilege against self-incrimination. Part II evaluates

---

1. I Am a Promise, a popular children's song.
2. 1991 La. Acts No. 325.
3. La. Ch.C. art. 808 (West 1991).
4. La. Ch.C. Title VIII (West 1991).
5. La. Ch.C. art. 808 (West 1991).

Article 808's equation of the constitutional rights of children with those of adults. And, part III examines whether, in certain contexts, children should have greater protections than those currently available for adults. Part III also presents some alternative procedures to those currently in force in Louisiana that could insure more competent and knowing waivers of *Miranda* rights by juveniles.

The purpose of this comment is to explore the significance of Article 808 in advancing children's constitutional rights and creating changes in the administration of the juvenile justice system beyond those created by the Supreme Court's constitutional domestication[6] of the system. These are important issues in our society where the juvenile crime rate is increasing,[7] the drug problem is multiplying exponentially, families are disintegrating and the resources necessary to effectively intervene are becoming increasingly scarce.[8]

II. ARTICLE 808: WHAT IT DOES

A. In General

1. Equates Children with Adults

Article 808 essentially equates children with adults insofar as constitutional rights under the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments are concerned. The only exception to this equation is the Sixth Amendment jury trial option which the article expressly excludes.

By equating children with adults in this manner, Article 808 goes beyond the holdings of the United States Supreme Court on the issue of the rights of accused juveniles in delinquency proceedings. In the landmark delinquency case *In re Gault*, the Supreme Court held that a child in the adjudicatory stage of a delinquency proceeding is entitled to the constitutional protections of (1) advance notice of the charges; (2) assistance of counsel; (3) opportunity to confront and cross-examine witnesses; and (4) the privilege against self incrimination.[9] In reaching this holding, the Supreme Court specifically noted that

> [w]e do not in this opinion consider the impact of these constitutional provisions upon the totality of the relationship of the

---

6. In re Gault, 387 U.S. 1, 22, 87 S. Ct. 1428, 1441 (1967). The *Gault* Court uses this term to refer to its principle that "neither the Fourteenth Amendment nor the Bill of Rights is for adults alone," id. at 13, 87 S. Ct. at 1436, and its extension of certain constitutional rights and procedural protections to accused juveniles in delinquency proceedings.

7. Ellis, The Deadliest Year Yet, Time, Jan. 13, 1992, at 18.

8. Riley, Corridors of Agony, Time, Jan. 27, 1992, at 48.

9. In re Gault, 387 U.S. 1, 87 S. Ct. 1428 (1967).

> juvenile and the state. We do not even consider the entire process relating to juvenile "delinquents." For example, we are not here concerned with the procedures or constitutional rights applicable *to the pre-judicial stages* (emphasis added) of the juvenile process nor do we direct our attention to the post-adjudicative or dispositional process.[10]

Subsequent to *Gault*, six more Supreme Court decisions examined the constitutional rights of children in delinquency proceedings. Two of these cases extend to children rights and protections equal to those to which adults in criminal trials are entitled. The Court in *In re Winship*[11] held that the stringent standard of proof "beyond a reasonable doubt" was applicable to juvenile delinquency proceedings just as it was applicable to criminal prosecutions. In *Breed v. Jones*,[12] the Court extended the protection against double jeopardy to juveniles so that a criminal prosecution of a juvenile subsequent to a delinquency adjudication based on the same conduct is barred. The procedures extended in both of these cases concern, as in *Gault*, the adjudicatory phase of a delinquency proceeding.

In three of the remaining four cases, the Supreme Court essentially ruled against extending additional rights to juveniles in delinquency proceedings. In *McKeiver v. Pennsylvania*,[13] the Court held that a jury trial option is not required in a delinquency proceeding,[14] despite the mandatory nature of such an option for adults. In *Schall v. Martin*,[15] the Court held that preventive detention for juveniles was constitutionally acceptable even though the Court had previously held that such detention of adults was unconstitutional.[16] In *New Jersey v. T.L.O.*,[17] the Court held that the warrantless search of the purse of a juvenile by school officials in a school setting without probable cause was constitutionally acceptable even though such a search of the purse of an adult would have been constitutionally unacceptable and would have resulted in the exclusion of any evidence so obtained. The issues presented in the *Schall v. Martin*[18] and *New Jersey v. T.L.O.*[19] cases concerned the preadju-

---

10. Id. at 13, 87 S. Ct. at 1436.
11. 397 U.S. 358, 90 S. Ct. 1068 (1970).
12. 421 U.S. 519, 95 S. Ct. 1779 (1975).
13. 403 U.S. 528, 91 S. Ct. 1976 (1971).
14. Note that Louisiana Children's Code article 808 continues this tradition.
15. 467 U.S. 253, 104 S. Ct. 2403 (1984).
16. However, since that time, the Supreme Court has held that under certain circumstances preventive detention of adults is constitutionally acceptable. See U.S. v. Salerno, 481 U.S. 739, 107 S. Ct. 2095 (1987).
17. 469 U.S. 325, 105 S. Ct. 733 (1985).
18. 467 U.S. 253, 104 S. Ct. 2403 (1984).
19. 469 U.S. 325, 105 S. Ct. 733 (1985).

dicatory stage of a delinquency proceeding as did the next case, *Fare v. Michael C.*[20]

In *Fare v. Michael C.*,[21] although the Court did not actually deny to juveniles a right enjoyed by adults in criminal proceedings,[22] it did hold that a juvenile's request to speak to his probation officer was not an invocation of the juvenile's Fifth Amendment privilege against self-incrimination. In addition, the Court held that the absence of a parent or other interested adult at the time of the waiver of the Fifth Amendment privilege against self-incrimination was not a per se invalidation of the waiver and subsequent confession. In other words, the Court left open the question of whether *Miranda* applied to the interrogation of juveniles while slamming the door, at least temporarily, on the extension of additional procedural protections to children beyond those applicable to adults.

In summary, the United States Supreme Court has generally limited to the adjudicatory stage of delinquency proceedings the extension to children of constitutional rights and accompanying procedural protections already guaranteed to adults. This selective approach to granting constitutional rights to juveniles is consistent with the current Court's glaring reticence with regard to making any dramatic, far-reaching holdings which may apply a *Gault*-like analysis to the pre- and post-adjudicatory stages of a delinquency proceeding.

In addition to going beyond the holdings of the United States Supreme Court, Article 808, by its comprehensive nature, also goes beyond the explicit holdings of the Louisiana Supreme Court. On a case by case basis, Louisiana courts have not withheld from accused juveniles any rights which were already possessed by accused adults,[23] with the

---

20. 442 U.S. 707, 99 S. Ct. 2560 (1979).

21. Id.

22. In fact, the Supreme Court specifically declared that it had not yet made *Miranda* applicable to juvenile proceedings. In speaking for the Court, Justice Blackmun stated:

> Indeed, this Court has not yet held that *Miranda* applies with full force to exclude evidence obtained in violation of its proscriptions from consideration in juvenile proceedings, which for certain purposes have been distinguished from formal criminal prosecutions (citation omitted). We do not decide that issue today. In view of our disposition of this case, we assume without deciding that the *Miranda* principles were fully applicable to the present proceedings.

Fare v. Michael C., 442 U.S. 707, 717 n.4, 99 S. Ct. 2560, 2567 n.4 (1979).

23. See, e.g., in the Fourth Amendment arena, State v. Mora, 307 So. 2d 317 (La. 1975) (involving a school search where both a warrant and probable cause were held to be required); State v. Hudson, 404 So. 2d 460 (La. 1981) (involving a home search where the suppression issue was analyzed by the court in a manner indistinguishable from that used in criminal cases); and State ex rel. Maness v. Black, 434 So. 2d 143 (La. App. 5th Cir.), writ denied, 435 So. 2d 446 (1983) (involving a search incident to the arrest of a juvenile where the analysis was again indistinguishable from that utilized in an adult

exception of the right to a jury trial.[24] However, as a blanket proposition, the Louisiana Supreme Court has never held that accused juveniles are entitled to the same rights as accused adults.

2. Mirrors Adult Rights and Protections

Article 808 is designed to function like a chameleon, its mandates ever changing to mirror those of its surroundings, namely the constitutional rights and accompanying procedural protections granted to adults. Thus, if a constitutional right or acompanying procedural protection has been granted to adults, a separate grant of such a right to children would be wholly superfluous.[25] Conversely, a specific withholding of a constitutional right to children while granting it to adults will have no authority in Louisiana, at least not in a delinquency context. But it should be noted that Article 808 only applies to *constitutional* rights, whether they be federal or state in origin.

B. More Specifically, With Respect to the Fifth Amendment[26]

In *In re Gault*, the Supreme Court held, *inter alia*, that the Fifth Amendment privilege against self-incrimination applied to delinquency suspects; however, the *Gault* holding was limited to the adjudicatory stage of delinquency proceedings. In *Fare v. Michael C.*,[27] the Supreme Court specifically declared that it had not yet made *Miranda* applicable to juvenile proceedings. In speaking for the Court, Justice Blackmun stated:

> Indeed, this Court has not yet held that *Miranda* applies with full force to exclude evidence obtained in violation of its prescriptions from consideration in juvenile proceedings, which for certain purposes have been distinguished from formal criminal prosecutions. . . . We do not decide that issue today. In view of our disposition of this case, we assume without deciding

---

context).

In the Fifth Amendment arena, see State ex rel. Dino, 359 So. 2d 586 (La. 1978).

In the Eighth Amendment arena, see State v. Franklin, 12 So. 2d 211 (La. 1943) and State ex rel. Banks, 402 So. 2d 690 (La. 1981), rev'g. 409 So. 2d 277 (La. App. 1st Cir. 1981).

24. See State ex rel. Dino, 359 So. 2d 586 (La. 1978).

25. See, e.g., County of Riverside v. McLaughlin, 111 S. Ct. 1661 (1991) and La. Ch.C. art. 817 and Comments.

26. La. Ch.C. art. 808 also has repercussions with respect to an accused juvenile's Fourth, Sixth and Eighth Amendment rights, but these will not be discussed in this comment.

27. 442 U.S. 707, 99 S. Ct. 2560 (1979).

that the *Miranda* principles were fully applicable to the present proceedings.[28]

Now, with the advent of Children's Code article 808, there is no doubt that the mandates of *Miranda*, to the extent that they are still applicable to adults, are also applicable to children in Louisiana. What follows is a brief sketch of the operational principles currently applicable to adults in the context of the Fifth Amendment privilege against self-incrimination. This sketch highlights what Children's Code article 808 means with respect to the Fifth Amendment privilege against self-incrimination.

1. Under the Federal Constitution

Although coerced confessions in federal prosecutions have been constitutionally prohibited since before the start of the twentieth century, constitutional limitations on the use of such confessions in state criminal prosecutions have been in place only since 1936. The Supreme Court developed the first such limitation on the states in *Brown v. Mississippi* in 1936.[29] The Court in *Brown* held that the Due Process Clause of the Fourteenth Amendment means "that state action, whether through one agency or another, shall be consistent with the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions."[30] Thus, the Court found that the use of a confession obtained by the brutal beating of the defendant was so flagrant and shocking that it violated the due process rights of the defendant under the Fourteenth Amendment.

This application of the Fourteenth Amendment to limit the admissibility of coerced confessions in state courts has become known as the "voluntariness test." If a confession is found to have been obtained from a defendant involuntarily, then it will not be admissible as evidence against the defendant. The voluntariness test has been applied to determine the admissibility of statements obtained from children as well as adults.[31]

---

28. Id. at 717 n.4, 99 S. Ct. at 2568 n.4.

29. 297 U.S. 278, 56 S. Ct. 461 (1936).

30. Id. at 286, 56 S. Ct. at 465 (quoting Hebert v. Louisiana, 272 U.S. 312, 316, 47 S. Ct. 103, 104 (1926)).

31. See Haley v. Ohio, 332 U.S. 596, 68 S. Ct. 302 (1948), and Gallegos v. Colorado, 370 U.S. 49, 82 S. Ct. 1209 (1962). Both of these cases involved juveniles tried and convicted as adults in criminal court. However, the due process standard articulated in the two cases is (or at least should be) equally applicable to delinquency proceedings. In both cases, the age of the defendants (fifteen and fourteen respectively) and their lengthy police interrogations without the presence of a parent, attorney or other friendly adult swung the pendulum of the involuntariness test in their favor. Commenting on the age factor, the Supreme Court in *Haley* noted "when, as here, a mere child—an easy victim of the law—is before us, special care in scrutinizing the record must be used." *Haley*, 332 U.S. at 599, 68 S. Ct. at 303-04.

The admissibility of confessions under the "voluntariness test" was and continues to be determined according to a highly discretionary "totality of the circumstances" examination of the events surrounding the confession. Since the discretionary aspect of the decision-making in such cases invariably leads to inconsistent results, the "voluntariness test" has been routinely criticized for providing insufficient protection to criminal defendants against coerced confessions.

The Supreme Court's agreement with such criticism and its attempt to remedy the problem is illustrated by its later decisions in *Escobedo v. Illinois*[32] and *Miranda v. Arizona*.[33] *Escobedo* is the culmination of a progression of decisions in which the Supreme Court attached increasing importance to a suspect's right to counsel during the interrogation process.[34] In *Escobedo*, the Court held that deprivation of a defendant's right to counsel under the Sixth Amendment would render any subsequently obtained evidence inadmissible if the denial occurred in certain specific factual situations.[35] Though the *Escobedo* Court mainly concerned itself with the Sixth Amendment right to counsel, it made a passing reference to the Fifth Amendment privilege against self-incrimination when it stated that the accused had a right to be advised by his lawyer of the privilege. Thus, an interplay between the Sixth Amendment right to counsel and the Fifth Amendment privilege against self-incrimination emerged.

In *Miranda v. Arizona*,[36] decided two years after *Escobedo*, the Supreme Court established a broad privilege against self-incrimination and very specific procedural safeguards to protect it. The Court held

---

32. 378 U.S. 478, 84 S. Ct. 1758 (1964).

33. 384 U.S. 436, 86 S. Ct. 1602 (1966).

34. Escobedo v. Illinois, 378 U.S. 478, 84 S. Ct. 1758 (1964). See also, Massiah v. U.S., 377 U.S. 201, 84 S. Ct. 1199 (1964). It is useful to note that *Escobedo* concerned a state prosecution and *Massiah* concerned a federal prosecution. Also, see the four-member dissent in Crooker v. California, 357 U.S. 433, 78 S. Ct. 1287 (1958) and the four-member concurrence in Spano v. N.Y., 360 U.S. 315, 79 S. Ct. 1202 (1959).

35. The Court in *Escobedo* stated

> We hold . . . that where, as here, the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect, the suspect has been taken into police custody, the police carry out a process of interrogations that lends itself to eliciting incriminating statements, the suspect has requested and been denied an opportunity to consult with his lawyer, and the police have not effectively warned him of his absolute constitutional right to remain silent, the accused has been denied "the Assistance of Counsel" in violation of the Sixth Amendment to the Constitution as "made obligatory upon the States by the Fourteenth Amendment," (citations omitted) and that no statement elicited by the police during the investigation may be used against him at a criminal trial.

Escobedo v. Illinois, 378 U.S. 478, 490-491, 84 S. Ct. 1758, 1765 (1964).

36. 384 U.S. 436, 86 S. Ct. 1602 (1966).

> that when an individual is taken into custody or otherwise deprived of his freedom by the authorities in any significant way and is subjected to questioning, the privilege against self-incrimination is jeopardized. Procedural safeguards must be employed to protect the privilege, and unless other fully effective means are adopted to notify the person of his right of silence and to assure that the exercise of the right will be scrupulously honored, the following measures are required. [The suspect] must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.[37]

Miranda is generally considered a milestone in legal history and is one of the most controversial decisions of the Supreme Court. Many critics have called for a complete overruling of *Miranda*.[38] In addition to external critics, the Court itself in recent years has shown a distaste for the requirements and implications of *Miranda* and has sought to eliminate or at least drastically mitigate the import of its commands.[39] This narrowing of *Miranda* should be kept in mind when considering *Miranda's* application in delinquency proceedings.

Finally, assuming *Miranda* is applicable, the most important issue in the context of confessions obtained by police interrogation is whether the confession was obtained subsequent to a valid waiver of the suspect's right to counsel and right to silence. The standard for evaluating whether

---

37. Id. at 478-479, 86 S. Ct. at 1630.

38. For example, in an attempt to overrule the strict warning requirements of *Miranda* in federal prosecutions, Congress passed Title II of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. § 3501 (1988), which essentially reinstates the "voluntariness" test as the measure of the admissibility of confessions. However, the statute has rarely been used and to date no ruling on the constitutionality of the statute has been made.

39. See, e.g., New York v. Harris, 401 U.S. 222, 91 S. Ct. 643 (1971), where the Court allowed statements taken in violation of *Miranda* to be used to impeach the defendant. The only restriction placed upon the use of such statements was that they had to be "voluntary," i.e. tested against the Fourteenth Amendment's "voluntariness" test.

See also New York v. Quarles, 467 U.S. 649, 104 S. Ct. 2626 (1984) where the Supreme Court created a public safety exception to *Miranda*.

Concerning the waiver issue, see Moran v. Burbine, 475 U.S. 412, 106 S. Ct. 1135 (1986) where the Court held that a suspect's waiver of his *Miranda* rights will be effective even though the police (1) decline to tell the suspect that a lawyer has been retained for him and (2) effectively prevent the lawyer from seeing the suspect.

Most significantly, see Oregon v. Elstad, 470 U.S. 298, 105 S. Ct. 1285 (1985) in which the Court held that a second admission obtained from a suspect following an unwarned admission by the suspect was admissible since the suspect had been warned prior to the second admission.

the waiver was indeed valid is whether it was made in a "voluntary, knowing and intelligent" manner. This standard parallels the voluntariness test of the Fourteenth Amendment. It is a "facts and circumstances" sort of test where a great deal of discretion is vested in the trial judge. It should be noted that the right to counsel and the privilege against self-incrimination create two separate waiver issues and accordingly are afforded separate treatment.[40] It should also be noted that the Court appears to attach little or no significance to the "knowing and intelligent" prong of the waiver standard.[41] In other words, as long as the Court can find that there was no police coercion in a suspect's waiver of his rights to counsel and silence, the waiver will be valid regardless of how irrational a suspect may have been in waiving the rights. Such an approach does not bode well for children, who are less capable than adults of making knowing and intelligent decisions.

2. *Under the State Constitution*

A parallel provision to the Fifth Amendment privilege against self-incrimination can be found in article I, section 16 of the 1974 Louisiana Constitution which provides in part that "[n]o person shall be compelled to give evidence against himself."[42] Supplementing that provision is Article I, Section 13 of the 1974 Louisiana Constitution which provides that "any person . . . arrested or detained in connection with the investigation or commission of any offense . . . shall be advised fully of the reason for his arrest or detention, his right to remain silent, his right against self-incrimination, his right to the assistance of counsel and, if indigent, his right to court appointed counsel."[43] A "plain meaning" reading of the above section and an analysis of the legislative

40. See Edwards v. Arizona, 451 U.S. 477, 484-85, 101 S. Ct. 1880, 1885 (1981) where the Court held that "an accused . . . having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police." Once the suspect has asserted a desire to have counsel, the police may not question him again prior to supplying him with that counsel (unless the suspect himself initiates the communication). An accused's request to see an attorney is a per se invocation of his Fifth Amendment rights.

Also, see Michigan v. Mosley, 423 U.S. 96, 96 S. Ct. 321 (1975), where the Court suggests that a defendant's assertion of his right to remain silent that terminates a first interrogation does not bar the police from questioning the suspect later as long as a "substantial period" has elapsed between the invocation of the right and the subsequent resumption of the interrogation.

41. See Colorado v. Connelly, 479 U.S. 157, 107 S. Ct. 515 (1986).

42. La. Const. art. I, § 16.

43. La. Const. art. I, § 13.

history behind the section illustrate that the framers intended to fully adopt the requirements of *Miranda*.[44]

Two significant distinctions should be noted between the federal and state provisions for the privilege against self-incrimination. First, by incorporating the *Miranda* warnings into Section 13 of the Louisiana Constitution, such warnings will continue to be required even if the United States Supreme Court subsequently overrules *Miranda*. Secondly, Louisiana law does appear to attach significance to the "knowing and intelligent" prong of the standard for waiver.[45]

III. Article 808: A Positive Step But . . .

Article 808's extension to accused juveniles of constitutional rights equal to those possessed by accused adults (except for the right to a jury trial) is a positive step for the Louisiana juvenile justice system. With the addition of Article 808, the delinquency determination has been made fairer to the child and less ambiguous to the juvenile justice personnel who formerly were confronted with the difficult question of which rights should and should not be extended to children in light of the Supreme Court's jurisprudence on the issue. The history of the juvenile court has proven that the dispensation of "justice" without constitutional procedures to define the process is nothing more than a revival of the Star Chamber with its inherent danger of vesting too much unrestrained power in the state.

Article 808 is the logical extension of a process of constitutional domestication[46] begun by the United States Supreme Court in 1966 in *In re Gault*.[47] The *Gault* Court observed that "unbridled discretion, however benevolently motivated, is frequently a poor substitute for principle and procedure."[48] Justice Fortas, in writing for the *Gault* majority, further observed:

> Failure to observe the fundamental requirements of due process has resulted in instances, which might have been avoided, of

---

44. State of Louisiana Constitutional Convention of 1973 Verbatim Transcripts, September 1-7, 1973, Vol. XIII, pp. 68-112, Vol. XIV, pp. 1-51; Lee Hargrave, The Declaration of Rights of the Louisiana Constitution of 1974, 35 La. L. Rev. 1, 40-48 (1974).

45. See State v. Glover, 343 So. 2d 118 (La. 1976) (where the court found that internal coercion was sufficient to render a confession involuntary). Also, see State v. Rankin, 357 So. 2d 803 (La. 1978). Compare with the federal approach at supra note 41.

46. See In re Gault, 387 U.S. 1, 22, 87 S. Ct. 1428, 1441 (1967). The *Gault* Court uses this term to refer to its principle that "neither the Fourteenth Amendment nor the Bill of Rights is for adults alone," id. at 13, 87 S. Ct. at 1436, and its extension of certain constitutional rights and procedural protections to accused juveniles in a delinquency proceeding.

47. 387 U.S. 1, 87 S. Ct. 1428 (1967).

48. Id. at 18, 87 S. Ct. at 1439.

> unfairness to individuals and inadequate or inaccurate findings of fact and unfortunate prescriptions of remedy. Due process is the primary and indispensable foundation of individual freedom. It is the basic and essential term in the social compact which defines the rights of the individual and delimits the powers which the state may exercise. . . . But, in addition, the procedural rules . . . are our best instruments for the distillation and evaluation of essential facts from the conflicting welter of data that life and our adversary methods present. . . . "Procedure is to law what 'scientific method' is to science."[49]

In other words, though the constitutional domestication of the juvenile court in part arose out of a desire to insure a more accurate fact-finding process (i.e. to facilitate the ascertainment of the truth), it was even more so designed to better balance the allocation of power between the state and the individual, in this case a child.

The *Gault* Court rejected the traditionally touted justifications of *parens patriae* and the belief that the proceedings were neither adversarial nor criminal in nature as reasons to curtail the constitutional rights of accused juveniles. In fact, in addition to extending to children certain constitutional rights to be applicable in the adjudicatory stage of delinquency proceedings, the Court held that juvenile delinquency proceedings were to be regarded as criminal in nature. The Court found that such a holding was mandated by the fact that a child adjudicated delinquent could face a loss of liberty and stigmatization as a result of the process.

As a consequence, the *Gault* Court, in criticizing the lack of procedures in the juvenile justice system, advised: "[s]o wide a gulf between the State's treatment of the adult and of the child requires a bridge sturdier than mere verbiage, and reasons more persuasive than cliché can provide."[50] The drafters of Children's Code article 808 heeded this advice and created Article 808 in response to their inability to find reasons beyond cliché for affording children in delinquency proceedings with fewer rights and procedural protections than those granted to adults in criminal prosecutions. Thus, Article 808 carries the torch of *Gault* further by extending to children in all stages of delinquency proceedings the same constitutional rights and procedural protections (except the right to jury trial) guaranteed to adults in criminal prosecutions.

In a practical sense, however, a gulf continues to separate children from adults in our society. In order for children to truly be able to exercise their rights on at least an equal basis with adults, in some contexts a new bridge needs to be built by providing additional pro-

---

49. Id. at 19-20, 87 S. Ct. 1439-1440 (quoting in part Foster, Social Work, the Law, and Social Action, in Social Casework, July 1964, pp. 383, 386).

50. 387 U.S. at 29-30, 87 S. Ct. at 1445.

cedural safeguards for children beyond those currently granted to adults. The analytical framework utilized by the Court in *Gault* could serve as the standard by which such proposed additional procedures could be analyzed.

Though the *Gault* holding was rather narrow,[51] the analytical framework which the Court used to extend procedural protections to delinquency proceedings was much broader. The Court utilized a "fundamental fairness" theory[52] to extend the constitutional protections of advance notice of the charges, assistance of counsel, and opportunity to confront and cross-examine witnesses.[53] The Court used a "functional equivalence"[54] theory to extend the privilege against self-incrimination.[55] Professor Rosenberg has penned the concurrent application of these two theories as the "dual-maximal" standard[56] and has noted that "[t]he advantage of the dual-maximal standard . . . is that it applies to children all the guarantees already applicable to adult criminal defendants, while also permitting enhanced protection of children because of their vulnerability and immaturity without making the additional protection automatically available to adults."[57]

Thus, in summary, Article 808 is a positive step for children in Louisiana and the juvenile justice system. It solves the first half of the problem which the United States Supreme Court recognized in *Kent v. United States*, that "there may be grounds for concern that the child receives the worst of both worlds: that he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children."[58] However, the second half of the problem remains unresolved. Consequently, every time a right or protection is at issue, the question should be asked whether children because of their

---

51. See supra text accompanying note 10.

52. Basically, this approach holds that only those rights which are "so rooted in the traditions and conscience of our people as to be ranked as fundamental" are applicable to the states through the Fourteenth Amendment. Snyder v. Massachusetts, 291 U.S. 97, 105, 54 S. Ct. 330, 332 (1934).

Under this view of due process, a particular procedure may be required even if it is not one that the Bill of Rights guarantees. Conversely, all of the Bill of Rights guarantees are not automatically applicable. To be applicable, they must first jump the "essential to fundamental fairness" hurdle. This view is similar to the "fundamental rights" approach to due process.

53. Rosenberg, The Constitutional Rights of Children Charged with Crime: Proposal for a Return to the Not So Distant Past, 27 UCLA L. Rev. 656, 665-66 (1980).

54. This view functionally equates delinquency proceedings with criminal trials, such that all rights and procedural protections extended to adults are likewise extended to juveniles. This approach is similar to the selective incorporation approach to due process.

55. Rosenberg, supra note 53, at 665-66.

56. Id. at 669, 671.

57. Id. at 671.

58. Id. at 661, 383 U.S. at 556, 86 S. Ct. at 1054 (1966).

unique characteristics and status need greater protections than those extended to adults.[59]

IV. Currently Existing Additional Rights for Children

The Louisiana Supreme Court's decision in *State ex rel. Dino*[60] is illustrative of an additional protection extended to children beyond the protections extended to adults because of the unique characteristics and status of children. The issue in *Dino* was the validity of the waiver of the rights to silence (i.e. the privilege against self-incrimination) and counsel by a juvenile. The *Dino* court held that waivers of the right to silence and counsel by juveniles must be evaluated according to a per se standard. The standard which the *Dino* court articulated requires that three conditions be met before a juvenile's waiver of *Miranda* rights can be valid, namely: (1) that the juvenile actually consulted with an attorney or an adult before waiver; (2) that the attorney or adult consulted was interested in the welfare of the juvenile; and (3) where an adult other than an attorney was consulted, that adult was fully advised of the rights of the juvenile.[61] The court rejected the totality of the circumstances approach for evaluating waivers by juveniles because of its tendency to mire the courts in a morass of speculation similar to that from which *Miranda* was designed to extricate them in adult cases. The court believed that a per se approach would add greater assurance to the determination of whether a child had "knowingly and intelligently" waived his rights.

The *Dino* holding is in direct contrast to the United States Supreme Court's holding on the issue of waivers of the rights to silence and counsel by juveniles. In *Fare v. Michael C.*,[62] a five to four decision, the Court adhered to its endorsement of the totality-of-circumstances test for evaluating whether a waiver of *Miranda* rights had been made in a "knowing, intelligent, and voluntary" manner, regardless of the fact that the waiver being evaluated was that of a juvenile rather than an adult.[63]

With respect to the right to counsel aspect, *Dino* is codified in Article 810[64] of the Louisiana Children's Code and thus continues to apply to children even with the enactment of Article 808. Without Article 810, it could have been argued that Article 808 implicitly overruled the *Dino* per se standard since the article equates the constitutional rights

59. 383 U.S. 541, 86 S. Ct. 1045 (1966).
60. 359 So. 2d 586 (La. 1978).
61. Id.
62. 442 U.S. 707, 99 S. Ct. 2560 (1979).
63. See supra text accompanying notes 20-21.
64. La. Ch.C. art. 810 (West 1991).

and protections of delinquency proceedings with those of criminal defendants. Possibly, the right to silence (i.e. privilege against self-incrimination) aspect of *Dino* has been implicitly overruled but the better argument appears to be that it survives in spite of Article 808's enactment due to its constitutional dimension.

Arguably, the *Dino* rule was at least a start in granting Louisiana children the procedural devices necessary to insure that they are truly able to understand and competently utilize the constitutional rights to which they are entitled. The *Dino* rule reflects empirical evidence which suggests that under the traditional *Miranda* approach children are simply not understanding their rights nor competently utilizing them. For example, one empirical study showed that children younger than fifteen years of age misunderstood at least one of the four standard *Miranda* statements and in comparison with adults, demonstrated significantly poorer comprehension of the nature and significance of their *Miranda* rights.[65]

Other non-empirical observations were made by the *Dino* court. For example, the court quoted appeals court Judge Fedoroff who in *State ex rel. Holifield* stated: "I cannot fathom how a minor, who lacks the capacity to sell, mortgage, donate or release (who could not even contract with the lawyer whose services he waives) can be said to possess the capacity to waive constitutional privileges and lose his freedom as a consequence."[66] In addition, the *Dino* court noted that

> [a]lthough the *Miranda* [C]ourt did not express itself specifically on the special needs of juveniles confronted with police interrogation, the reasons given for making the warnings an absolute prerequisite to interrogation point up the need for an absolute requirement that juveniles not be permitted to waive constitutional rights on their own.[67]

In other words, the *Dino* court was saying that the same reasons that justify *Miranda* in fact justify the imposition of additional safeguards to protect the rights of children.[68]

---

65. Grisso, Juveniles' Capacities to Waive *Miranda* Rights: An Empirical Analysis, 68 Cal. L. Rev. 1134 (1980).

66. 319 So. 2d 471, 475 (La. App. 4th Cir. 1975) (Fedoroff, J., concurring).

67. State ex rel. Dino, 359 So. 2d 586, 591 (La. 1978).

68. Whether one agrees or disagrees with the *Miranda* decision depends on one's view of the role of confessions in combating crime in our society and the proper balance of power between the individual and the state. This author believes that the principles advocated and established in *Miranda* are good ones. Why would the Fifth Amendment privilege against self-incrimination be included in the Bill of Rights if the intent was that the people should not understand the right and consequently be ineffective in utilizing it to protect themselves from the power of the state? However, it is possible that an alternative

Although *Dino* was a start, it may not go far enough. The assumptions underlying its creation, namely that the presence of the child's parents would benefit the child because the parents' interests would be aligned with the child and the parents would understand their child's rights and effectively advise him or her, may be invalid. Conflicting interests[69] between the child and his parent(s), emotional reactions by the parents to their child's detention or the ignorance of the parents may render the parents unable to provide the support and counsel which the child needs.[70] Evidence from one empirical study corroborates this possibility. The study found that parental presence during interrogation may actually be detrimental rather than helpful to the child's understanding of his rights and ability to effectively utilize them since many of the parents studied did not directly advise their children about the waiver and the ones who did almost always urged the child to waive his rights.[71]

Thus, in summary, *Dino* was a good faith attempt to provide in the waiver context an additional procedure for children that took into account the unique characteristics and status of children. In more specific terms, the *Dino* court was attempting to provide a fair procedure for the waiver of rights that reflected the generally reduced competency of children. However, as already noted, *Dino* may not do enough and new questions arise. What additional protections are necessary to insure that children can understand and competently exercise their rights to silence (i.e. privilege against self-incrimination) and counsel? Does Article 808 preclude the courts from creating constitutional protections for children beyond those for adults, thereby reserving such determinations for the legislature? Arguably, Article 808 does not act as a preclusion since if a right is of constitutional dimension, it should be extended regardless of what the legislature has said. If so, then the issue becomes whether the Louisiana Constitution requires the protection, since at the present time, it is clear that the United States Constitution as currently interpreted does not require such additional protections for children.

---

or alternatives (for example, videotaping of police interrogation) to *Miranda* can be developed that would preserve its underlying principles and motivations and thereby allow *Miranda* to be dismantled. However, until such an alternative or alternatives are available and being effectively utilized, this author believes that the commands of *Miranda* should be followed.

69. Note that Louisiana Children's Code article 810(C) attempts to eliminate at least some of the conflict by providing for the appointment of an attorney for the child whenever the interest of the child and his parents or other adult advisor conflict.

70. Grisso, supra note 65, at 1142.

71. T. Grisso, Juveniles' Waiver of Rights: Legal and Psychological Competence, at 187, 200 (1981).

IV. Recommendation for Further Procedural Protections for Children in the Waiver of Rights Context

If the *Dino* procedural requirements are not sufficent to insure that a child understands and competently exercises or waives his rights to silence and counsel, then what procedures would advance those ends? Several alternative procedures are available.

First, a per se rule could be adopted requiring a juvenile to consult with an attorney at least once before a waiver of his rights to silence and counsel will be deemed valid. Texas adopted such a provision in 1973. However, since then, Texas has amended the statute so as to significantly reduce its impact.[72] Yet, even the current watered-down Texas statute is note-worthy in requiring that a child be advised of his *Miranda* rights by a magistrate. In addition, if a waiver is made, it must be made in writing in the presence of a magistrate independent of the presence of a law enforcement officer or prosecuting attorney.

Second, an even more protective approach is not only to require that the juvenile consult with an attorney before waiving any rights but also to make the juvenile's right to counsel nonwaivable. This is the position taken by the Juvenile Justice Standards Project[73] as well as a number of commentators.[74]

---

72. Tex. Fam. Code Ann. § 51.09 (Vernon 1991).

73. Institute of Judicial Administration and American Bar Association, Juvenile Justice Standards Project, (hereinafter referred to as Juvenile Justice Standards Project), Standard 3.2 which relates to Standards Relating to Police Handling of Juvenile Problems (1980) recommends that:

> Police investigation into criminal matters should be similar whether the suspect is an adult or a juvenile. Juveniles, therefore, should receive at least the same safeguards available to adults in the criminal justice system. This should apply to:
>
> A. preliminary investigations (e.g., stop and frisk);
> B. the arrest process;
> C. search and seizure;
> D. questioning;
> E. pretrial identification; and
> F. prehearing detention and release.
>
> For some investigative procedures, greater constitutional safeguards are needed because of the vulnerability of juveniles. Juveniles should not be permitted to waive constitutional rights on their own. In certain investigative areas not governed by constitutional guidelines, guidance to police officers should be provided either legislatively or administratively by court rules or through police agency policies.

Standard 5.1, Standards Relating to Pretrial Court Proceedings, (1980) recommends that "[i]n delinquency cases, the juvenile should have the effective assistance of counsel at all stages of the proceeding" and that this right to counsel should be mandatory and nonwaivable.

74. See, e.g., Grisso, supra note 65, at 1163-1164 and Feld, Criminalizing Juvenile Justice: Rules of Procedure for the Juvenile Court, 69 Minn. L. Rev. 141, 184-90 (1984).

All of these procedures present very viable, and arguably more effective, alternatives to Louisiana's current approach to insuring that any waiver of a child's constitutional rights is made in a knowing and intelligent manner. In varying degrees, they all provide the child access to the most potent weapon he can utilize to defend him against the powerful forces of the state: an attorney.

V. CONCLUSION

Article 808 equates the constitutional rights of accused juveniles with those of accused adults. As a result, the article grants to children in Louisiana greater rights than they had previously possessed under the United States or Louisiana Constitutions as interpreted by the respective supreme courts.

With respect to the Fifth Amendment privilege against self-incrimination, Article 808 makes *Miranda*[75] specifically applicable to accused juveniles. Though this was no new innovation in Louisiana due to the presence of *Dino*[76] and other Louisiana cases holding that *Miranda* applies to juveniles, it does go beyond the United States Supreme Court's holding in *Fare v. Michael C.*[77]

Article 808's enactment was a positive step on behalf of children in Louisiana since as Justice Fortas in *Gault* noted, "unbridled discretion, however benevolently motivated, is frequently a poor substitute for principle and procedure."[78] However, the equating of the rights of children with adults may be insufficient in certain contexts to insure that children can truly understand and exercise those rights on an equal basis with adults. In those contexts where the adult procedures are insufficient to protect the rights of children, additional safeguards for children need to be implemented.

This comment has suggested that within the specific context of the waiver of *Miranda* rights, children need additional protections beyond those available to adults. As a class, children simply are not as competent as adults to make decisions concerning the waivers of these rights. In addition, children sometimes do not even understand what their rights are, despite the giving of *Miranda* warnings.

With *Dino* and its subsequent codification in the Children's Code,[79] Louisiana has implemented an additional protection for children within the waiver of *Miranda* rights context. However, the *Dino* rule may be insufficient to protect children from their lack of knowledge and relative

75. Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602 (1966).
76. State ex rel. Dino, 359 So. 2d 586 (La. 1978).
77. 442 U.S. 707, 99 S. Ct. 2560 (1979).
78. 387 U.S. at 18, 87 S. Ct. at 1439.
79. La. Ch.C. art. 810 (West 1991).

incompetence. This comment has presented several procedures that could function as more effective alternatives to the *Dino* rule. These alternative procedures should be carefully examined by the legislature and the courts with an eye toward adopting the procedure(s) which would best insure that children who do waive their *Miranda* rights are doing so in a knowing and intelligent manner.

In addition, in contexts beyond the waiver of *Miranda* rights, the legislature and the courts should be ever vigilant to provide children with the additional protections they need to safeguard their constitutional rights whenever their unique characteristics and status so require. Such vigilance will insure that children receive the best of both worlds to which the *Kent* Court refers: the protections accorded to adults and the solicitous care and regenerative treatment postulated for children.[80]

Jan Kirby Byland

---

80. Kent v. United States, 383 U.S. 541, 556, 86 S. Ct. 1045, 1054 (1966).